

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA BOARD OF ANIMAL HEALTH

In the Matter of the Proposed Permanent
Rule Relating to Diseases of Domestic
Animals. Minnesota Rules Chapters
1700.2100 – 1700.2500 and 1715.0005 –
1715.0190.

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde at 1:00 p.m. on April 14, 1998, at the Agriculture Building, 90 West Plato Boulevard, Saint Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.31 to 14.20 (1996), to hear public comment, to determine whether the Minnesota Board of Animal Health (hereafter "the Board ") has fulfilled all relevant substantive and procedural requirements of the law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable, and whether or not modifications to the rules proposed by the Board after initial publication are impermissible, substantial changes.

Paul Strandberg, Assistant Attorney General, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared on behalf of the Board at the hearing. The Board's hearing panel consisted of Paul L. Anderson, DVM, MS, Equine Division Director for the Board, Thomas Hagerty, DVM, Executive Secretary of the Board, Keith Friendshuh, DVM, Poultry and Companion Division, and William Hartmann, DVM, Cattle and Ruminants Division. Many of the Board's members also attended the hearing.

Approximately 50 persons attended the hearing. Forty-one persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed amendments to these rules.

The record remained open for the submission of written comments for ten working days following the hearing to April 28, 1998. During the initial comment period the ALJ received written comments from interested persons and the agency. Pursuant to Minn. Stat. § 14.15, subd. 1, five working days were allowed for the filing of responsive comments. During the responsive comment period the agency submitted comments replying to the written comments submitted during the initial comment

period. No changes were made to the proposed rule. The record closed on May 5, 1998.

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The Board may then adopt a final rule or modify or withdraw its proposed rule. If the Board makes changes in the rule other than those recommended in this report, it must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the Board must submit it to the Revisor of Statutes for a review of the form of the rule. The Board must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements.

1. On May 13, 1997, the Board published a Request for Comments on planned rule amendments to rules governing livestock, including equine infectious anemia (EIA). The Request for Comments was published at 21 State Register 1758. Exhibit 1.

2. On January 26, 1998, the Board requested the scheduling of a tentative hearing date and filed the following documents with the Chief Administrative Law Judge:

- (a) a copy of the proposed rules certified by the Revisor of Statutes;
- (b) the Dual Notice of Hearing proposed to be issued; and
- (c) a draft of the Statement of Need and Reasonableness (SONAR).

3. The Board mailed a copy of the SONAR to the Legislative Reference Librarian on January 30, 1998. Exhibit 4. On February 13, 1998, the Board mailed the Dual Notice of Hearing to all persons and associations who had registered their names with the agency for the purpose of receiving such notice. Exhibit 7. The Board received over twenty-five signatures from persons requesting a hearing be held on this matter. On March 18, 1998, the Board mailed a notice stating that a hearing would be held on this rulemaking to persons who requested a hearing and a number of other persons who might be interested in attending the hearing.

4. On February 17, 1998, a copy of the proposed rules and the Dual Notice of Hearing were published at 22 State Register 1391.

5. On the day of the hearing, the Board placed the following additional documents into the record:

- (a) the Request for Comments published at 21 State Register 1758 (Exhibit 1);
- (b) certificate of the Board's resolution authorizing the adoption of rules by dual notice (Exhibit 2);
- (c) the proposed rule, certified by the Revisor of Statutes (Exhibit 3);
- (d) the SONAR (Exhibit 4);
- (e) a copy of the letter transmitting the SONAR the Legislative Reference Librarian (Exhibit 5);
- (f) the Notice of Hearing and copy of the proposed rules as published in the State Register (Exhibit 6);
- (g) the Board's Certificate of Mailing, provision of additional notice, and certification of the mailing list as accurate and complete (Exhibit 7);
- (h) the Notice of Hearing sent to commentators who requested a hearing (Exhibit 8);
- (i) the Certificate of Mailing a Notice of Hearing to commentators who requested a hearing and other interested persons (Exhibit 9);
- (j) comments received during the solicitation for comments period (Exhibit 10);
- (k) all written comments received by the Board during the thirty day period for requesting a hearing (Exhibit 11);
- (l) all written comments received by the Board after the thirty day period for requesting a hearing (Exhibit 12);
- (m) a summary of the Board's witness testimony at the hearing (Exhibit 13);
- (n) maps and charts of EIA infection (Exhibit 14);
- (o) U. S. Department of Agriculture EIA pamphlet (Exhibit 15);
- (p) EIA-Hotzone Project Testing Results: 1997 (Exhibit 16);
- (q) U.S. Department of Agriculture recommended EIA control measures (Exhibit 17); and
- (r) a facsimile transmission of the some of the exhibits to the Office of Administrative Hearings (Exhibit 18).

Nature of the Proposed Rules.

6. This rulemaking proceeding involves amendments to the Board's rules governing the control of infectious disease in horses. The particular disease targeted by these rules is Equine Infectious Anemia (EIA). EIA is caused by a virus transmitted through the blood of an infected horse. The usual method of transmission is for biting flies to carry infected blood from one horse to another horse in the immediate vicinity. There is no known cure for the disease and no vaccine to prevent transmission of the disease. A horse may have small amounts of the virus in its blood and show no outward signs of the disease. As the amount of the virus in the horse's blood increases, so too does the likelihood that the horse will pass on the disease. The Board has

proposed rules to require testing of horses for EIA when imported into Minnesota (with certain exceptions) and when any horse is attending an exhibition (with one exception). In addition, the proposed rule prohibits attendance at exhibitions by swine from pseudorabies-quarantined herds.

Statutory Authority

7. The Board cites Minn. Stat. § 35.03, as the source of its authority to adopt these rules. SONAR, at 1. That statutory provision states:

35.03 Powers, duties, and reports.

The board shall protect the health of Minnesota domestic animals and carry out the provisions of this chapter. The board shall make rules necessary to protect the health of domestic animals. The board shall meet at least quarterly. Officers must be elected each April. On or before November 1 of each year the board shall publish an annual report.

Minn. Stat. § 30.03 (1997).

8. The proposed rules are solely concerned with the health of domestic animals. The Administrative Law Judge finds that the Board has the statutory authority to adopt the proposed rule amendments.

Rulemaking Legal Standards.

9. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, one of the determinations which must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, the Board may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences. ***Manufactured Housing Institute v. Pettersen***, 347 N.W.2d 238, 244 (Minn. 1984); ***Mammenga v. Department of Human Services***, 442 N.W.2d 786 (Minn. 1989). The Board prepared a Statement of Need and Reasonableness ("SONAR") in support of the amendments of the rule. At the hearing, the Board primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by Board staffers at the public hearing and in its written posthearing comments.

The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule. ***In re Hanson***, 275 N.W.2d 790 (Minn. 1978); ***Hurley v. Chaffee***, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950). Arbitrary or unreasonable agency

action is action without consideration and in disregard of the facts and circumstances of the case. **Greenhill v. Bailey**, 519 F.2d 5, 19 (8th Cir. 1975). A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute. **Mammenga**, 442 N.W.2d at 789-90; **Broen Memorial Home v. Minnesota Department of Human Services**, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985). The Minnesota Supreme Court has further defined the Board's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." **Manufactured Housing Institute**, 347 N.W.2d at 244. The Board is entitled to make choices between possible approaches as long as the choice it makes is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the Board. The question is rather whether the choice made by the Board is one that a rational person could have made. **Federal Security Administrator v. Quaker Oats Company**, 318 U.S. 218, 233 (1943).

In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the Board has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule. Minn. Rule 1400.2100.

In this matter, no changes have been proposed to the rule after publication of the rule language in the State Register. Because of this circumstance, there is no basis for the Administrative Law Judge to determine if the new language is substantially different from that which was originally proposed. Minn. Stat. § 14.15, subd. 3 (1996). The standards to determine if the new language is substantially different are found in Minn. Stat. § 14.05, subd. 2 (1996).

Impact on Farming Operations.

10. Minn. Stat. § 14.111 imposes an additional notice requirement when rules are proposed that affect farming operations. The Board made no mention of the statute or whether it applies in this rulemaking. The statute states:

14.111 Farming operations.

Before an agency adopts or repeals rules that affect farming operations, the agency must provide a copy of the proposed rule change to the commissioner of agriculture, no later than 30 days prior to publication of the proposed rule in the State Register.

A rule may not be invalidated for failure to comply with this section if an agency has made a good faith effort to comply.

Minn. Stat. § 14.111.

While the Board did not indicate that the issue of impact on farming operations had been considered, the Board did send its dual notice to Frederick Mitchell, Director of the Dairy and Food Inspection Division of the Minnesota Department of Agriculture. Exhibit 7. The proposed rules do not impose restrictions or have a direct impact on fundamental aspects of farming operations. The Administrative Law Judge finds that the proposed rule change will not impact farming operations in Minnesota, and finds that no additional notice is required. Were additional notice to be required, the inclusion of Mr. Mitchell on the Board's mailing list would constitute a good faith effort to comply with Minn. Stat. § 14.111 under the circumstances of this case.

Classes of Persons Affected by the Proposed Rules

11. Minn. Stat. § 14.131 requires an agency adopting rules to include in its SONAR:

(1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

(2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

(3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;

(4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

(5) the probable costs of complying with the proposed rule; and

(6) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

In its SONAR, the Board included an analysis performed to meet the requirements of this statute. The Board noted the anticipated costs will be incurred by persons who exhibit horses. The laboratory cost of each test was identified as eight dollars. *Id.* at 2. The Board noted in addition, a veterinarian fee would be required for test administration. At the hearing, the Board explained that the cost for veterinarian service was not stated due to variations between fees charged throughout the State. The Board indicated its own costs in administering the rule would be negligible.

12. The Board did not identify any less costly methods to achieve the outcomes sought by the rules. No commentators indicated that methods other than testing are available to restrict the spread of EIA. The Board indicated that horses testing positive for EIA are prohibited from moving interstate by the Code of Federal Regulations. SONAR, at 2. Horses testing positive are prohibited from interstate movement for reasons other than for slaughter, research, or quarantine at the horse's home farm by 9 C.F.R. §75.4(b). At the hearing, the Board described how the proposed rules are consistent with the Uniform Methods and Rules for detecting and controlling EIA, published by the U.S. Department of Agriculture (USDA). Exhibit 17. The Board has met the statutory requirements for assessing the impact of the proposed rules.

Analysis of the Proposed Rules

General

13. This Report is limited to the discussion of the portions of the proposed rule amendments that received significant critical comment or otherwise need to be examined. Accordingly, the Report will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion has been carefully read and considered. Moreover, because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the Department has demonstrated the need for and reasonableness of the provisions of the amended rules that are not discussed in this report by an affirmative presentation of the facts, that such provisions are specifically authorized by statute, and that there are no legal barriers to adoption.

14. Furthermore, where changes are made to a rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed. Minn. Stat § 14.05, subd. 3. The standards to determine if the new language is substantially different from that which was originally proposed by the Board are found in Minn. Stat. § 14.05, subd. 2. In this rulemaking, no changes were proposed to the language published in the State Register. Therefore, no issue arises as to whether the language constitutes a substantially different rule.

Rule-by-Rule Discussion

15. The comments received by letters and at the public hearing focused on the proposed amendments to EIA testing requirements. The comments ranged from removing all testing requirements to expanding testing to all horses in the State. Each portion of the proposed rule amendments that was commented upon will be discussed individually.

1700.2200 – Certificates of Veterinary Inspection for Horses

16. Minn. Rule 1700.2200 requires all horses being imported into Minnesota to have a certificate of veterinary inspection issued by an accredited veterinarian within thirty days prior to importation with several exceptions. Performing horses in rodeos, circuses, and animal acts; horses brought into Minnesota for trail rides, exhibitions, and horse shows; suckling foals that are accompanied by a negative dam, and horses consigned to slaughter, with or without a positive EIA test, are not required to have that certificate under the existing language in Minn. Rule 1700.2200. In this proceeding, the Board proposes to delete the exception for performing horses and move the exception for suckling foals to the new rule part on EIA testing.

17. No commentators objected to requiring veterinary certificates when a horse is imported into Minnesota. Several commentators expressed concern that horses were not being inspected at the time the horses crossed the border into Minnesota. The Board indicated that enforcement of the importation rules is complaint-based and there is widespread voluntary compliance. The proposed language for Minn. Rule 1700.2200 is needed and reasonable.

1700.2300 – Contents of Certificate of Veterinary Inspection

18. The minimum content of certificates required under Minn. Rule 1700.2200 is specified by Minn. Rule 1700.2300. Under the existing rule, the certificate must contain adequate information to identify each horse, certification that each horse tested negative for EIA within the twelve months prior to importation, the EIA test date, and the name of the laboratory that performed the analysis of blood samples. The Board proposes to amend the rule by deleting the requirement for having the EIA test results in all certificates of veterinary inspection. The remaining language is modified to qualify the EIA testing date and laboratory requirement as being required in the certificate only when EIA testing is required.

19. The Board described the proposed change to the rules as making the rules “easier to understand.” SONAR, at 4. The existing language required certificates to contain the results of an EIA test, even when the test was not required of horses being imported into the state. The proposed language clarifies that EIA test results are only required in certificates when the test is required. The rule part is needed and reasonable as proposed.

1700.2305 – Requirement for EIA Test

20. The Board has proposed a new rule part, 1700.2305, to establish the requirement for an EIA test for horses imported into Minnesota. All horses to be imported into Minnesota are required to have a negative test result within twelve months of the date of importation except for three categories of horse. The first exempt category is for horses consigned to federally inspected slaughtering establishments. The second exempt category is reactors consigned to slaughtering establishments operated under the Federal Meat Inspection Act. Reactors are defined under Minn. Rule 1700.2100, subp. 6 as horses that have tested positive for EIA. The third exempt category is suckling foals accompanying a negative dam.

21. For horses being imported into Minnesota, the new rule part is similar in effect to the existing rule. Only two additional groups of imported horses are required to have EIA testing under the proposed rules over the existing requirements. The first group is horses that are brought into Minnesota for trail rides. Those horses must test negative for EIA within 12 months of the date of importation. The second group is horses in rodeos, circuses, and other animal acts that must test negative for EIA as well.

22. John Gintner, Western Saddle Club Association (WSCA) and Randy Denton indicated that horses brought to slaughter are routinely examined for fitness and the best horses make their way to the sale barn. To the extent that this practice involves horses imported into Minnesota, the practice is a violation of the existing federal and state rules. During exhibitions, this practice is governed by Minn. Rule 1715.0060. That rule exempts horses from testing only if they are kept isolated from other horses during the exhibition and the horses are actually slaughtered. No different language is needed to address the problem identified by the commentators.

23. No commentators objected to the requirement for testing performing animals. Regarding trail rides, John Gintner indicated that horse flies are found on trail rides and suggested that horses be tested when they are moved. Muriel Poelher of Many Ways Ranch and S. Lynn Kittleson, D.V.M., of Goldmount Veterinary Center, P.A., indicated that testing does not guarantee that a horse is not infected, only that the horse was not infected at the time of the test. Jody Rooney, President of the Minnesota Horse Council, suggested that conflicts will arise if untested horses are brought on trail rides near horses whose owners do test for EIA.

24. EIA testing is not a complete solution to the transmission of the disease. The Board acknowledged that the measures being proposed in these rules would not eliminate EIA. Board Comment, at 3. The Board indicated that its rules are intended to control the spread of the disease and contrasted the effort mounted against pseudorabies in swine as an example of an eradication program. States have differed as to the degree of testing needed to curb the spread of EIA. See Poehler Comment, *Equus Magazine, The Politics of EIA* (February, 1996). Louisiana, with 373 cases of EIA positive horses from 29,338 tested between 10/1/94 and 9/30/95, instituted a universal-testing program of all horses in the state. *Id.* Arkansas, with similar rates of

EIA occurrence, considered allowing horse owners to require that an adjacent horse owner's animals be tested. *Id.* By contrast, Oregon, Montana, Nebraska, and Washington, with a combined total of 14 cases of EIA positive horses from 26,976 tested between 10/1/94 and 9/30/95, have significantly eased or dropped EIA testing. *Id.* Over the same period of time, Minnesota had 16 cases of EIA positive horses from 17,432 tested. *Id.* The Board has demonstrated that control of EIA is a reasonable approach to the disease and there is no defect in the proposed rules by not adopting an entire program of EIA eradication.

25. Commentators differed in their perception of the risk of EIA infection on trail rides. Trail rides do provide limited exposure to other horses. The constant presence of people leads to the avoidance of large numbers of biting flies. The Board implicitly acknowledges that the risk of transmission is less likely at trail rides, since EIA testing is not required of horses stabled in Minnesota before participating in trail rides. The Board's imposition of testing for trail rides is based on the desired outcome of precluding importation of EIA infected horses into Minnesota, except for the limited exemptions in proposed rule 1700.2305.

26. Edward Hauser testified about the impact of a positive test on a horse that had been brought to a riding club event in Wisconsin. A horse owner brought a horse that had not been well to an event, prior to receiving the test results on that horse from the veterinarian. Once EIA was diagnosed, the horses that had been in contact with the infected horse were all quarantined and their owners were unable to show or ride those horses in events until the quarantine period expired. Dr. Lisa Borzynski, of Anoka Equine Veterinary Services indicated that nonapparent carriers have transmitted EIA to healthy horses. The Board introduced data from the USDA indicating that as few as 25 horse flies have transmitted EIA from a horse with no clinical signs of disease. Exhibit 15, at 11 (the apparently healthy horse is shown in Figure 6).

27. Dr. Borzynski indicated that infected horses were more likely to experience increased levels of virus when those horses were stressed. Randy and Mary Forseth indicated that travel could provide that stress for horses. Public Exhibit 21. In-state horse owners are also more likely to carefully assess their own horse's condition before participation in trail rides, out of consideration for their neighbors. The harmful impact of the mere presence of EIA-positive horses on other horse owners supports EIA testing of horses imported for trail rides. The Board's differing treatment of imported horses and in-state horses is supported by the record in this matter.

28. As discussed at Finding **20**, above, there are three categories of horses that may be imported into Minnesota without testing negative for EIA under the proposed rules. Under the federal standards, there are an additional two groups of horses that have tested positive for EIA that are allowed to be transported between states. These are horses transported either to approved research facilities or to their herd of origin for quarantine. 9 C.F.R. §75.4(b)(2) and (3). The Uniform Rules include both the research facility and herd of origin exemptions from the prohibition on interstate movement of EIA-positive horses. Exhibit 17, at 24-25. The rules proposed by the Board do not allow either group of horses to be imported. There is no evidence in the

record that any approved research facility exists in Minnesota. No commentators indicated that the prohibition against movement for home-farm quarantine would work a hardship on horse owners. The record in this matter does not make clear whether a Minnesota horse testing positive for EIA while out of state would be allowed to return to its home farm. There is no defect in the rule from omitting these two exceptions from the Board's proposed rule. Should the Board wish to conform its proposed rule to the federal transportation standards, that new language would be both needed and reasonable, and not substantially different from the rule as originally proposed.

1715.0005 – Definitions

29. The Board has proposed adding definitions to the existing rule defining terms, Minn. Rule 1715.0005. The new language consists of four subparts defining "Coggins test", "EIA", "horse", and "official test". In each case, the Board has taken the language verbatim from the definitions for each term found in Minn. Rule 1700.2100, subps. 2-4, and 5a. The new language is needed and reasonable, as proposed.

1715.0020 – Exemption

30. The existing exemption for performing horses and livestock used in rodeos, circuses, and animal acts from some of the requirements of the animal health rules is proposed to be modified in this rulemaking. The modifications would limit the exemption to the quarantine, official veterinarian, and species-specific rules for exhibition. The exemption only applies when the performing horses and livestock are isolated from other animals at the exhibition. The Board's modification of Minn. Rule 1715.0020 is needed and reasonable.

1715.0125 – Testing of Horses for Equine Infectious Anemia

31. Proposed rule 1715.0125 requires any horse attending an exhibition to have tested negative to EIA within the twelve months prior to the opening date of that exhibition. Unlike the other EIA testing provisions, this requirement would apply both to horses imported into Minnesota and horses residing in the state.

32. The most common objection to the mandatory exhibition-testing requirement is the additional expense incurred by horse owners. Kim Otterson said the expense of 4-H events, where many young horse owners exhibit, are particularly onerous. Otterson indicated that she had been charged \$52.00 per horse for testing. Richard Henze, Sr., of Henze's R 3 Ranch, also indicated that the cost to young exhibitors would be too great and reduce participation in exhibitions.

33. Van P. Jacobsen, President of the Minnesota Arabian Horse Association, supported the exhibition-testing requirement as being consistent with safeguarding all horses in Minnesota. Public Exhibit 20. Lisa Houle, member of the 4-H Riding Renegades, supported the testing requirement on exhibitions and urged expanding the yearly EIA testing requirement to horses participating in trail rides and any other event where horses mingle. Marilyn Henningson indicated that her daughter's 4-H club voted to require EIA testing at the Wright County Fair and attendance at that event did not

suffer. The Board proposed these rule amendments only after receiving a large number of requests to extend mandatory EIA testing to all horses at exhibitions. Board Comment, at 3 and 7. The EIA Uniform Methods and Rules disseminated by the USDA contain a testing requirement for horses participating in exhibitions. Exhibit 17, at 17.

34. Several commentators indicated that group testing could be arranged for horses that significantly reduces the cost. Estimates of \$12.00 to \$15.00 per horse were cited by commentators. So long as such testing is done during those months when biting flies are not present, the risk of transmission is extremely low. The Board supported the idea of group testing at the hearing. Since the bringing together of the horses would be solely for testing and not competition or display to the public, these gatherings do not fall under the definition of “exhibition” at Minn. Rule 1715.0005, subd. 4.

35. Jody Rooney, Roy Shumway, Vice President of the Minnesota Horse Council, and Randy Denton, member of the Northern Minnesota Draft Horse Association, pointed out that the rules do not indicate who must check that the required testing has been performed. The Board responded that those exhibitions with an official veterinarian could rely upon that person to check. For exhibitions without an official veterinarian, the event organizers are responsible. Sam Henningson indicated that she and another teenager have been responsible for checking Coggins papers (documentation of EIA testing) at the Wright County Fair and they have had no problems doing so. The Uniform Rule expressly requires event officials to review test documentation of all equines attending the event. Not specifying the responsible person in the proposed rules does not constitute a defect in the rules proposed by the Board. If the Board should choose to add language to the proposed rule that would expressly require event officials or the official veterinarian (where present) to check documentation, that language would be needed and reasonable and not substantially different from the rules as proposed.

36. Dr. Walt Mackey related his experience as an official veterinarian at exhibitions. Horses are examined visually for symptoms of illness or disease. The ability of a veterinarian to detect EIA with such an examination is very limited. The only assurance a veterinarian has that the horse being examined is not a nonapparent carrier of EIA is through EIA test documentation. While such documentation does not demonstrate that the horse is free from the disease, the documentation does significantly reduce the risk that the horse is a carrier.

37. Leona Jenson, member of two saddle clubs from Crow Wing County, described the impact of boarding a horse that later tested positive for EIA. Jenson urged the Board to adopt mandatory testing for all horses in Minnesota. Shirley Sova, chair of the Western Saddle Club Association, also suggested mandatory testing of all horses to eradicate EIA.

38. Barbara J. Kass of the Kutt-A-Ways Saddle Club maintained that the most effective means of curbing EIA transmission would be to test horses at the time the horse is sold. The Uniform Rule includes testing of horses at the time of transfer

and introduction into sale markets. Exhibit 17, 18-19. The Board indicated that its approach was taken after it received numerous suggestions from individual horse owners that testing as a requirement of attendance at exhibitions was needed. The Board indicated that no such requests had been received to extend testing to horses being sold.

39. Horse buyers can make testing negative for EIA a condition of purchase. Some of the commentators who opposed mandatory testing at exhibitions require testing when purchasing or boarding horses. Individual horse owners cannot control what horses attend exhibitions. Absent a rule requirement, horse owners must rely upon exhibit organizers to require and enforce standards. The Board has demonstrated the need and reasonableness of testing horses prior to attendance at exhibitions. The need for mandatory testing of all horses in Minnesota or requiring testing at the time of sale have not been shown at this time. The Board cannot adopt the suggestions for mandatory universal testing or testing at time of sale in this proceeding, because these suggestions would render the proposed rule substantially different from the rule as proposed in the State Register.

40. Rooney, Shumway, Sova, Bill Robbins, and others suggested that a one-year moratorium be placed upon the requirement for EIA testing at exhibitions. Steve Pooch, Competition Director at the Minnesota State Fair, indicated that some exhibitors are reluctant to bring horses to the State Fair if all horses are not required to be tested for EIA. Regardless of the exhibitors' concerns, Pooch suggested delaying imposition of the testing requirement until January 1, 1999. The Board has declined to delay imposition of the exhibition rule. Testing can be performed at any time of the year and there is no significant delay in receiving test results. There is no defect in the rules resulting from imposing the exhibition rule as soon as the rule becomes effective.

41. Dr. Kittleson, Murial Poehler, and Greg Johnson argued that the EIA test was killing more horses than the disease. The Board responded that the rules do not require killing the horse, but the horse must be prevented from spreading EIA. With the evidence in the record that nonapparent carriers can pass on the disease, infected horses must either be euthanized or permanently quarantined. Each owner must decide what approach to take should the disease be discovered in that person's horse.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Board of Animal Health gave proper notice in this matter.
2. The Board has fulfilled the procedural requirements of Minn. Stat. § 14.14, and all other procedural requirements of law or rule.

3. The Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii).

4. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4 and 14.50 (iii).

5. There were no additions or amendments to the proposed rules suggested by the Board after publication of the proposed amended rules in the State Register. Therefore there is no substantially different language from the proposed amended rules as published in the State Register within the meaning of Minnesota Stat. §§ 14.05, subd. 2 and 14.15, subd. 3.

6. Any Findings which properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

7. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts as appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted.

Dated this 3rd day of June, 1998.

JON L. LUNDE
Administrative Law Judge

Reported: Taped, No Transcript Prepared